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INJUNCTIONS AGAINST OCCUPATIONAL HAZARDS: TOWARD A SAFE WORKPLACE ENVIRONMENT

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I. INTRODUCTION

Recently, at an automobile casting plant in Michigan an employee was assigned the job of dumping conveyor bucket carriers filled with scrap through holes, each approximately four and one-half feet square, in a platform forty-three feet above the ground. The platform had seventeen such unguarded openings regularly spaced along its length. While performing his assigned task the employee fell through one of the unguarded holes and sustained serious physical injuries.[1] The existence of such workplace hazards is not uncommon at manufacturing facilities and construction sites throughout the United States. It is therefore essential that attention be focused on the options open to individual employees faced with unsafe working conditions.

In 1970, in response to the increasing number and severity of work-related injuries and illnesses in the United States,[2] Congress passed the Occupational Safety and Health Act.[3] However, for a variety of reasons that Act has failed to deal effectively with the circumstances which led to its enactment, and the problem of assuring safe and healthful workplaces for working men and women

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* Executive Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] Facts derived from Moore v. Giffels Associates, Inc., No. 75-058, 910-NP (D. Mich. Sept. 12, 1979).

[2] 29 U.S.C. § 651(a) (1976); S. REP. No. 1282, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177-78.

[3] Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651 to 678 (1976)).

is still one of great magnitude.[4] The importance of safety necessitates that an employee have effective avenues of redress open to him. One option of great value may be his ability to gain direct access to the courts for relief. Yet, the existence of the Occupational Safety and Health Act, a comprehensive legislative scheme under which there is no private right of action, may impede direct employee access to the courts. Congressional enactment of such an exhaustive administrative remedy was simultaneously a requirement that it be utilized. Moreover, for the employee in a union shop who is party to a collective bargaining agreement, the strong labor policy in this country which manifests a deference to collective action may be a further factor inhibiting his ability to act independently to remedy his situation.

This article considers whether an individual employee can, consistent with the Occupational Safety and Health Act and American labor policy, maintain a private action to enjoin unsafe working conditions. First, the adequacy of employee protection under the Occupational Safety and Health Act and other federal statutes pertinent to workplace safety is considered. Next, the availability of an injunction is evaluated in light of the existence of the Act. Finally, consideration is given to the appropriateness of deferring the prevailing labor policy when a safety issue is being addressed. Reasons and precedent for the accommodation of labor policy in a safety context are examined.

II. Safety in the Workplace: A Statutory Scheme

A. *The Enactment of the Occupational and Safety and Health Act: Legislative Recognition of the Importance of Safety in the Workplace*

In 1970, Congress enacted the Occupational Safety and Health Act (the Act)[5] in order "to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources."[6] This was explicit recognition of the increasing number and severity of work-related injuries and illnesses and their adverse impact on the economy and the human condition.[7] This Act was the first comprehensive at-

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[4] See note 7 *infra*.

[5] Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651 to 678 (1976)).

[6] 29 U.S.C. § 651(b) (1976).

[7] *Id.* § 651(a); S. Rep. No. 1282, *reprinted in* [1970] U.S. Code Cong. & Ad. News 5177-

tempt by the federal government to provide a safe workplace environment for working men and women.[8] The emphasis in the Act is on prevention rather than treatment and compensation for injury.[9] Its preventive purpose is clearly set forth in the Act's statement of purpose and policy,[10] and a complex legal and administrative framework is developed to facilitate its achievement.[11]

Of particular significance is the requirement that each employer comply with occupational safety and health standards promulgated under the Act.[12] The Occupational Safety and Health Administration (OSHA) is designated by the Act to set these mandatory standards with the aid of the National Institute for Occupational Safety and Health (NIOSH), a research body responsible for developing and recommending standards, and other federal bodies established by the Act.[13]

In order to supplement the employee protection provided by mandatory health and safety standards, the Act also imposes on

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78. The National Safety Council has estimated that 14,000 deaths and 2.2 million disabling injuries occur annually due to accidents on the job. These statistics may understate the problem since, for the most part, they do not reflect occupational disease. The Department of Health, Education and Welfare has estimated that 390,000 new cases of occupational disease appear annually and as many as 100,000 deaths occur each year as a result of occupational disease. N. ASHFORD, CRISIS IN THE WORKPLACE 46-47 (1976) [hereinafter cited as ASHFORD].

[8] ASHFORD, *supra* note 7, at 142.

[9] *Id.* at 5. For legislation which deals solely with compensation for work injuries, *see* The Compensation for Work Injuries Act of 1966, 5 U.S.C. §§ 8101 to 8193 (1976).

[10] 29 U.S.C. § 651(b)(1)-(b)(13) (1976).

[11] Several federal bodies are designated by the Act to provide the support necessary to administer and enforce it. The Occupational Safety and Health Administration (OSHA) located within the Department of Labor is charged with administering the provisions of the Act. The Act requires OSHA to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce and to conduct inspections of work places covered under the Act for the purpose of assuring compliance with the Act. 29 U.S.C. §§ 655, 657(a) (1976). OSHA has the power to issue citations and assess penalties against employers for violations. *Id.* §§ 658, 666. The Occupational Safety and Health Review Commission exists as an independent, quasi-judicial body that reviews all challenged enforcement actions of the Occupational Safety and Health Administration. *Id.* § 661. The National Institute for Occupational Safety and Health (NIOSH), a research body located within the Department of Health, Education & Welfare, is responsible for developing and recommending occupational safety and health standards. *Id.* § 671. Furthermore, the National Advisory Committee on Occupational Safety and Health (NACOSH) is appointed by the Secretary of Labor to advise the Secretaries of Labor and HEW on matters relating to the administration of the Act. *Id.* § 656(a). The Secretary of Labor may also appoint other advisory committees to aid him in his standard-setting functions under the Act. *Id.* § 656(b).

[12] *Id.* § 654(a)(2); see text at notes 21-35 *infra*.

[13] See note 11 *supra*.

each covered[14] employer a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."[15] The potential deficiency of the Act without some type of general duty obligation was explicitly recognized and discussed in its legislative history. The Senate Committee on Labor and Public Welfare, which reported on the proposed legislation stated:

> The committee recognizes that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune. Therefore, to cover such circumstances the committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards to the health and safety of their employees.[16]

It is clear that existing and potential health and safety standards and the general duty obligation were seen as cornerstones of the federal legislative program to assure workplace safety.

B. The Inadequacy of the Occupational Safety and Health Act and the Need for Other Avenues of Redress

Despite its comprehensive nature, it is widely agreed that the Act has not lived up to its stated purpose[17] or the lofty expectations commentators had for it.[18] In the words of one author:

> The OSH Act has failed thus far to live up to its potential for reducing job injury and disease, for fostering the internalization of the social cost of health and safety hazards, for encouraging technological innovations, or for stimulating job redesign. OSHA has had little measurable impact in reducing injuries and deaths, and the problems in the health

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[14] Generally, the Act applies to any employer who is engaged in a business affecting commerce in the United States or any territory administered by the United States. ASHFORD, *supra* note 7, at 143; 29 U.S.C. § 652(5) (1976).

[15] 29 U.S.C. § 654(a)(1) (1976).

[16] S. REP. No. 1282, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5185-86.

[17] The congressional articulation of the purpose of the Act may be found at 29 U.S.C. § 651(b) (1976).

[18] *See, e.g.*, Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 LOY. OHIO L.J. 247 (1972).

area have become even more serious since 1970.[19]

In essence, "effective, prompt law enforcement has not occurred."[20]

One major problem is the minimal number of standards which have been developed under the Act. Occupational safety and health standards may be categorized into three classes based on method of promulgation: a) existing (interim) standards adopted under section 6(a);[21] b) new (permanent) standards promulgated pursuant to section 6(b);[22] and c) emergency temporary standards adopted under section 6(c).[23] Section 6(a) authorized the Secretary of Labor to promulgate as an occupational safety or health standard, for a period ending two years after the effective date of the Act,[24] any national consensus standard[25] and any established federal standard.[26] Such standards were not subject to rule-making procedures required by the Administrative Procedure Act.[27] The Secretary used the expedited section 6(a) procedure to adopt scores of national consensus and federal standards which comprise the main body of what are now called the general industry standards.[28]

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[19] ASHFORD, *supra* note 7, at 13.

[20] Blumrosen, Ackerman, Kligerman, Van Schaick, & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CALIF. L. REV. 702, 715 (1976) [hereinafter cited as Blumrosen]. See also Metzenbaum, *The Occupational Safety and Health Act: A Promise That Failed*, 8 AKRON L. REV. 416 (1975).

[21] 29 U.S.C. § 655(a) (1976).

[22] *Id.* § 655(b).

[23] *Id.* § 655(c).

[24] The effective date of the Act was 120 days after Dec. 29, 1970, Pub. L. 91-596 § 34.

[25] 29 U.S.C. § 655(a) (1976). Section 3(9) defines a "national consensus standard" as: any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies. 29 U.S.C. § 652(9) (1976).

[26] *Id.* § 655(a) (1976). Section 3(10) defines "established Federal Standard" as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970." 29 U.S.C. § 652(10) (1976).

[27] 5 U.S.C. § 553 (1976). Congress reasoned that established federal standards had already been exposed to procedural scrutiny by other agencies, and national consensus standards were developed after public debate. As a consequence these standards could be adopted immediately to protect employees without infringing on employers' procedural rights. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 41 (1978).

[28] 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 1022 (1977).

Subsequent to 1973, however, the section 6(a) procedure ceased to be available for adoption of standards. The procedures provided under sections 6(b) and 6(c) remain the sole means available to the Secretary for standard promulgation. Under section 6(b) the Secretary of Labor "may by rule promulgate, modify or revoke any occupational safety or health standard"[29] if he complies with the detailed rule-making procedures specified in that section. Under section 6(c), the Secretary must provide for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger."[30] However, an emergency temporary standard may remain in effect for only six months;[31] thereafter, the Secretary must adopt a permanent standard or the protection of the temporary standard will cease.

To date, OSHA has adopted only eleven *new* permanent safety standards[32] and twenty-four *new* permanent health standards.[33] In many cases the permanent standards were challenged in the courts.[34] The numerous legal and political problems encountered

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[29] 29 U.S.C. § 655(b) (1976).

[30] *Id.* § 655(c)(1).

[31] *Id.* § 655(c)(3).

[32] The eleven safety standards are: Servicing Multi-Piece Rim Wheels, 29 C.F.R. § 1910.177; Helicopters, 29 C.F.R. § 1910.183 (1979); Slings, *Id.* § 1910.184; Telecommunications, *Id.* § 1910.268; National Electrical Code, *Id.* § 1910.309; Rollover Protective Structures; Overhead Protection, *Id.* §§ 1926.1000-.1003; Rollover Protective Structures, *Id.* §§ 1928.51-.53; and Guarding of Farm Field Equipment, Farmstead Equipment, and Cotton Gins, *Id.* § 1928.57.

[33] The 24 health standards are: Air contaminants, 29 C.F.R. § 1910.1000 (1979); Asbestos, *Id.* § 1910.1001; 4-Nitrobiphenyl, *Id.* § 1910.1003; alpha-Naphthylamine, *Id.* § 1910.1004; Methyl chloromethyl ether, *Id.* § 1910.1006; 3,3' -Dichlorobenzidine (and its salts), *Id.* § 1910.1007; bis-chloromethyl ether, *Id.* § 1910.1008; beta-Naphthylamine, *Id.* § 1910.1009; Benzidine, *Id.* § 1910.1010; 4-Aminodiphenyl, *Id.* § 1910.1011; Ethyleneimine, *Id.* § 1910.1012; beta-Propiolactone, *Id.* § 1910.1013; 2-Acetylaminofluorene, *Id.* § 1910.1014; 4-Dimethylaminoazobenzene, *Id.* § 1910.1015; n-Nitrosodimethylamine, *Id.* § 1910.1016; Vinyl chloride, *Id.* § 1910.1017; Inorganic arsenic, *Id.* § 1910.1018; Lead, *Id.* § 1910.1025, Benzene, *Id.* § 1910.1028; Coke oven emissions, *Id.* § 1910.1029; Cotton dust, *Id.* § 1910.1043; 1, 2-dibromo-3-chloropropane, *Id.* § 1910.1044; Acrylonitrile, *Id.* § 1910.1045; and Exposure to cotton dust in cotton gins, *Id.* § 1910.1046.

[34] ASHFORD, *supra* note 7, at 158. For cases upholding OSHA standards *see, e.g.*, Synthetic Organic Chemical Manufacturers Association v. Brennan, 506 F.2d 385 (3d Cir. 1974), *cert. denied*, 2 OSHC 1654 (May 1975); Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

by OSHA in promulgating permanent standards[35] necessitate that it proceed with great care in this process and have adequate technical data to support its standards requirements. As a consequence, it is unlikely that the rate of standard promulgation will accelerate in the future.

Since only a relatively small number of health and safety standards have been developed under the Act, the general duty clause[36] remains "the only viable enforcement mechanism for protection from the majority of health hazards."[37] However, the potential usefulness of the general duty clause has been limited. The Occupational Safety and Health Review Commission[38] has held that an employer may not be cited under the general duty clause when there exists a specific standard covering the condition.[39] In addition, the usefulness of the general duty clause has been severely restricted in those circuits which adopted the approach delineated in *National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission.*[40] In that case, the Occupational Safety and Health Review Commission reversed its hearing examiner who had dismissed an OSHA citation against National Realty and instead found National Realty in serious violation of the general duty clause for permitting an employee to stand as a passenger on the running board of a front-end loader while the loader was in motion. The Court of Appeals for the District of Columbia Circuit concluded there was not substantial evi-

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[35] ASHFORD, *supra* note 7, at 154-59. Note the discussion of the special problems which were encountered in setting carcinogen standards. *See also* Industrial Union Department, AFL-CIO v. American Petroleum Institute, 48 U.S.L.W. 5022 (1980).

[36] 29 U.S.C. § 654 (a)(1) (1976).

[37] ASHFORD, *supra* note 7, at 163. *See* Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970,* 86 HARV. L. REV. 988 (1973) for a discussion of the meaning of and problems raised by the general duty clause.

[38] See note 11 *supra.* Final orders of the Occupational Safety and Health Review Commission may, on petition, be reviewed by a United States court of appeals. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 342 (1978).

[39] Brisk Water Proofing Co., Inc., [1973-1974] OSHD (CCH) ¶ 16,345 (July 1973) (general duty citation for unsafe provision of access to a scaffold held invalid where a particular standard applied to the alleged violation); Sun Shipbuilding and Drydock Co., [1973-1974] OSHD (CCH) ¶ 16,725 (October 1973) (citation for violation of the general duty clause dismissed on the ground that employer was cited on the same facts for a violation of a more specific standard).

[40] 489 F.2d 1257 (D.C. Cir. 1973); *accord* Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979); Champlin Petroleum Co. v. OSHRC, 593 F.2d 637 (5th Cir. 1979); Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978); General Elec. Co. v. OSHRC, 540 F.2d 67 (2d Cir. 1976); Brennan v. OSHRC, 502 F.2d 946 (3d Cir. 1974).

dence to support the Commission's finding. It held that to sustain his burden of proof on a general duty charge the Secretary of Labor must specify the particular steps a cited employer should have taken to avoid citation and demonstrate the feasibility and likely utility of those measures.[41] Stricter requirements for proving a violation of the general duty clause serve to further limit employee protection from potential health hazards, particularly since one reason that more health standards have not been issued is that industrial hygiene data is often inconclusive.[42] The relative ineffectiveness of the general duty clause as a tool for prevention of occupational injury is indicated by the fact that it is most frequently cited during inspections occasioned by accidents which have already caused severe injury or death.[43]

The extent of OSHA's enforcement activity also detracts from the Act's effectiveness as a means for providing safe working conditions. The total number of inspections conducted by OSHA declined from 108,796 in 1976 to 57,242 in 1978,[44] and only 28% of the violations cited in 1978 were classified as serious.[45] In fact, OSHA's statistics for October 1977 through August 1978 show that no citations were issued at all in 54 percent of the health complaint investigations, 32 percent of the safety complaint investigations, and 30 percent of the safety complaint investigations involving both safety and health.[46] Among those inspections initiated through complaints, cited violations are seldom categorized as serious. Furthermore, in a recent report, the General Accounting Office criticized OSHA for not responding quickly enough to complaints which involved potentially serious hazards.[47]

It is clear that the inadequacy of administrative enforcement under the Act has detracted significantly from its ability to ameliorate the problems which necessitated its enactment. To some ex-

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[41] National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

[42] ASHFORD, *supra* note 7, at 163.

[43] 1. EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 1002 (1979).

[44] [1978-1979 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,688.

[45] *Id.* It should also be noted that the percentage of violations classified as serious did not exceed 4% in each of the years from 1973-1976 and was only 14% in 1977. The percentage increased to 28% in 1978. *Id.*

[46] *Id.* ¶ 11,665.

[47] U.S. GENERAL ACCOUNTING OFFICE, HOW EFFECTIVE ARE OSHA'S COMPLAINT PROCEDURES (1979), *noted in* [1978-1979 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,665.

tent, though, other federal statutes and regulations may operate to fill the void created by the disappointing results obtained through enforcement of the Act.

III. Other Avenues of Recourse for the Employee

It is generally agreed that no private cause of action arises under the Occupational Safety and Health Act.[48] Courts have viewed the express provisions of the Act[49] and the comprehensive adminstrative apparatus created to enforce it[50] as indicating congressional intent that no private cause of action for damages should arise. Yet, the inadequacy of enforcement under the Act clearly points up the need for other avenues of relief for affected employees. In this section, other options open to the employee faced with hazardous working conditions are explored.

A. Statutory Options

1. The Strike

Under federal labor law, employees are permitted to walk off the job without reprisal in two instances: 1) where such conduct can be deemed protected concerted activity under section 7 of the National Labor Relations Act,[51] and 2) where obeying a work order would place an employee in a situation of abnormal danger to his safety or health.[52] However, these statutory paths are fraught with

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[48] *See, e.g.*, Russell v. Bartley, 494 F. 2d 334 (6th Cir. 1974); Skidmore v. Travelers Ins. Co., 356 F. Supp. 670 (E.D. La. 1973), *aff'd*, 483 F.2d 67 (5th Cir. 1973); Annot., 35 ALR Fed. 461 (1977).

It should be noted that under § 13(a) of the Act, 29 U.S.C. § 662(a) (1976), the Secretary of Labor may seek an order "to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter." If the Secretary "arbitrarily or capriciously" fails to seek relief under § 13(a), any employee who could be injured by reason of such failure may seek a writ of mandamus under § 13(d) to compel the Secretary to seek an order. 29 U.S.C. § 662(d) (1976).

[49] 29 U.S.C. § 653(b)(4) (1976). The language of this section has been interpreted as evidencing a congressional intention that there be no private civil remedy under the Act. *See, e.g.*, Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974).

[50] See note 11 *supra*.

[51] 29 U.S.C. § 157 (1976). Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . "

[52] Labor Management Relations (Taft-Hartley) Act § 502, 29 U.S.C. § 143 (1976).

practical hazards and the individual employee who undertakes to refuse unsafe work in reliance upon them may be risking sanctions up to and including job loss.

For a section 7 safety walkout, employees need only have a subjective belief that working conditions are unsafe.[53] However, only concerted activity is protected by section 7. In order for refusal to accept hazardous work to qualify as concerted activity it must meet several requirements,[54] including a requirement that the activity further some group interest. Thus, section 7 is only available when hazardous work is refused for the mutual benefit of other employees as well; a solitary employee who refuses work solely on behalf of himself will not be protected.[55] Moreover, where a collective bargaining agreement contains a no-strike clause, union-sanctioned walkoffs over health and safety are restricted under section 7,[56] and "[w]alkoffs by a minority of employees is in derogation of the union and in conflict with the union's exclusive representation would not be protected by [section] 7."[57] Finally, the coverage of section 7 is limited. It does not protect supervisors[58] or agricultural workers,[59] and small employers are exempt because the National Labor Relations Board does not choose to exercise jurisdiction over them.[60]

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[53] Union Boiler Co. 213 N.L.R.B. No. 113 (1974), *enforced*, 530 F.2d 970 (4th Cir. 1975).

[54] "(1) there must be a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper." Shelly & Anderson Furniture Mfg. Co., Inc. v. N.L.R.B., 497 F.2d 1200, 1202-03 (9th Cir. 1974).

[55] *See* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979); N.L.R.B. v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973); Pacific Electricord Co. v. N.L.R.B., 361 F.2d 310 (9th Cir. 1966).

[56] *See, e.g.*, Gary Hobart Water Corp. v. N.L.R.B., 511 F.2d 284 (7th Cir. 1975), *cert. denied*, 423 U.S. 925 (1975); Food Fair Stores, Inc. v. N.L.R.B., 491 F.2d 388 (3d Cir. 1974).

[57] Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety & Health Act*, 52 NOTRE DAME LAWYER 802, 805 (1977).

[58] *E.g.*, Hanna Mining Co. v. Marine Engineers Beneficial Ass'n, 382 U.S. 181 (1965); N.L.R.B. v. Silver Bay Local Union No. 962, 498 F.2d 26 (9th Cir. 1974).

[59] Marshall v. Whirlpool Corp., 593 F.2d 715, 726 n.23 (6th Cir. 1979).

[60] *Id.* Even where the National Labor Relations Board has power to act, a 1959 amendment to the NLRA gives the Board discretion to decline jurisdiction over labor disputes involving any class or category of employers where the effect of such labor dispute on commerce is insubstantial. The Board's discretion is limited in only one respect: jurisdiction cannot be declined over a case which would have been accepted under NLRB jurisdictional yardsticks (standards) prevailing on August 1, 1959. 29 U.S.C. § 164(c)(1) (1976). Those yardsticks require assertion of jurisdiction for retail concerns only if the gross yearly volume of business is over $500,000. 1 LAB. L. REP. (CCH) ¶ 1610 (1972).

An alternative to the section 7 walkout is provided in section 502 of the Taft Hartley Act which states in relevant part: "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."[61] Yet, despite its "good faith" language, the standard for proving the existence of section 502 "abnormally dangerous conditions" is an objective one. In *Gateway Coal Co. v. United Mine Workers of America*,[62] the Supreme Court held that the union must submit "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."[63] Thus, an employee who claims section 502 protection must be correct as to the existence of an abnormally dangerous condition in order to be protected against employer reprisals. He must also present evidence acceptable as proof of the presence of abnormal danger. One commentator[64] researched the judicial developments relating to section 502 in an attempt to determine under what circumstances working conditions are abnormally dangerous to the extent that a job action would be protected activity. He stated:

> The obvious conclusion to be drawn from [an] analysis of Section 502 is that reliance upon its protection by employees is a very complicated and risky matter. . . . The employees must consider the extent and abnormality of the danger, they must plot a course of action which is protected and, hopefully, they will map a strategy conducive to a favorable settlement.
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> All of these responsibilities are fraught with another form of industrial danger, i.e., discharge.[65]

2. The Retaliatory Discharge Provision of the Occupational Safety and Health Act

The Secretary of Labor has interpreted the Occupational Safety and Health Act's retaliatory discharge provision[66] as protecting an

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[61] 29 U.S.C. § 143 (1976).

[62] 414 U.S. 368 (1974).

[63] *Id.* at 387 (quoting dissenting opinion, Gateway Coal Co. v. United Mine Workers of America, 466 F.2d 1157, 1162 (3d Cir. 1972)).

[64] Ferris, *Resolving Safety Disputes: Work or Walk*, 26 LAB. L.J. 695 (1975).

[65] *Id.* at 704.

[66] 29 U.S.C. § 660(c)(1) (1976). This provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any pro-

employee who, with no reasonable alternative, withdraws from danger of serious injury or death on the job. Under a Labor Department regulation,[67] an employee is protected where (a) if possible, he previously sought and was unable to obtain a correction of the dangerous condition, (b) his fear of the condition was objectively reasonable, and (c) there was insufficient time due to the urgency of the situation to eliminate the danger through resort to regular OSHA enforcement channels.

In a recent decision, the Supreme Court upheld the validity of

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ceeding under or related to [the Act] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [the Act].

Id.

[67] 29 C.F.R. § 1977.12 (1973). The regulation provides:

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards. (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Id.

this regulation.[68] After considering the Act's language and structure, the Court concluded that on its face the regulation furthered the overriding purpose of the Act and complemented its remedial scheme.[69] Finding no contrary indication in the legislative history, the Court held that the regulation was "promulgated by the Secretary in the valid exercise of his authority under the Act."[70]

In sustaining the validity of the Secretary's regulation the Court further advanced the cause of adequate protection for employees: the regulation provides equitable relief for the employee discharged or otherwise discriminated against for withdrawing from danger of serious injury or death on the job.[71] However, the employee's decision to refuse work will not be free of risk. For the employee to be protected, his fear of danger must be objectively reasonable and must be subsequently vindicated by the courts.[72] The Supreme Court identified the conditions under which such subsequent vindication would be denied: "any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith."[73] Moreover, consistent with the nonexistence of a private right of action under the Act,[74] the employee may not bring his own action for retaliatory discharge or discrimination. He must file a complaint with the Secretary and the Secretary must determine after an investigation that judicial action against the employer is warranted.[75] If the Secretary determines otherwise the employee is without remedy.

B. The Availability of an Injunction

The preceding brief overview of existing statutory remedies for employees faced with occupational hazards indicates there may be circumstances where the employee is less than adequately protected. Consider, for instance, the plight of an employee whose job is to perform singlehandedly a task for which no specific OSHA standards exist. He may suspect that performing the task has

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[68] Whirlpool Corp. v. Marshall, 48 U.S.L.W. 4189 (1980).

[69] *Id.* at 4192.

[70] *Id.* at 4194-95.

[71] Marshall v. Whirlpool Corp., 593 F.2d 715, 734-35 (6th Cir. 1979), *aff'd*, 48 U.S.L.W. 4189 (1980).

[72] *Id.* at 734.

[73] Whirlpool Corp. v. Marshall, 48 U.S.L.W. 4189, 4194 (1980).

[74] See text at notes 48-50 *supra*.

[75] 29 U.S.C. § 660(c)(2) (1976).

placed him in danger, yet he may not refuse to work for fear of discharge if the danger cannot subsequently be substantiated. A possible alternative for this employee is enforcement of his common law right to a safe workplace by way of injunction. An injunction is an order by a court sitting "in equity" that a party do, or refrain from doing, certain specified acts.[76] In the case of an employee seeking to enjoin a workplace hazard, the order if granted would require removal or modification of the unsafe condition.

1. The Common Law Right to a Safe Work Environment and the Question of Pre-emption

The common law right to a safe workplace has its origin in the cases dealing with the tort liability of a master to his servant at common law.[77] At common law it is the master's duty to use reasonable care to provide a proper and safe workplace, and failure to use reasonable diligence to protect the employee from unnecessary risks will cause the employer to be answerable for ensuing damages.[78] Thus the employer is under an affirmative duty to provide a work area that is free from unsafe conditions. "Where an employer is under a common law duty to act, a court of equity may enforce an employee's rights by ordering the employer to eliminate any preventable hazardous condition which the court finds to exist."[79]

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[76] Dellapenna, *Emergency Injunctions Under OSHA*, 8 ENVT'L L. 723, 733 (1978).

Generally, equity requires a petitioner to demonstrate four prerequisites for equitable relief - that there is no adequate remedy at law; that there is a proper, generally legal, basis of liability; that the remedy is practicable to enforce; and that the granting of the remedy will not produce unfairness, unconscionability, or inequity. *Id.* at 734. In granting equitable relief judicial discretion is bounded by these principles. *Id.* at 735.

[77] PROSSER, TORTS § 80 (4th ed. 1971). For a discussion of the emergence of the right to work under safe conditions, and extensive citations, *see* Blumrosen, *supra* note 20, at 708-12.

[78] PROSSER, TORTS § 80 (4th ed. 1971); Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 454, 78 A.2d 411, 416 (Super. Ct. App. Div. 1951), *certification denied*, 7 N.J. 77, 80 A.2d 494 (1951).

[79] Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 524, 368 A.2d 408, 411 (Super. Ct. Ch. Div. 1976).

In *Shimp*, plaintiff, a telephone company secretary who was allergic to cigarette smoke, sought to have cigarette smoking enjoined in the area where she worked. Plaintiff attempted to alleviate the problem through the use of grievance mechanisms established by collective bargaining between defendant employer and her union; however, that action resulted in a solution which proved unsuccessful. The Superior Court held that an employee has a common law right to a safe work environment and that the work area involved in the case was unsafe due to a preventable hazard. The Court ordered the defendant, New Jersey Bell Telephone Company, to provide safe working conditions for plaintiff by restricting smoking to a non-work area used as a lunchroom. Alfred W.

Such equitable proceedings have not been pre-empted by congressional adoption of the Occupational Safety and Health Act. This is made clear in the statutory language:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.[80]

This provision recognizes concurrent state power to act either legislatively or judicially under the common law with regard to occupational safety.[81] In enacting the Act, Congress explicitly recognized and reaffirmed the common law obligation to provide a safe and healthful work environment. This is indicated in the legislative history:

> Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. . . . The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment 'which is free from recognized hazards so as to provide safe and healthful working conditions,' *merely restates* that each employer shall furnish this degree of care.[82]

Blumrosen, co-author of *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions, supra* note 20, was of counsel and on the brief in the case.

[80] 29 U.S.C. § 653(b)(4) (1976).

[81] Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 522, 368 A.2d 408, 411 (Super. Ct. Ch. Div. 1976).

[82] S. Rep. No. 1282, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5186 (emphasis supplied). There is similar language in H.R. REP. No. 1291, 91st Cong., 2d Sess. 21 (1970). The text of the general duty clause as finally enacted differs from that referred to in the Senate Report. See text at note 15 *supra*.

In Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973), the author characterizes the words "merely restates" as misleading. He bases his conclusion on the fact that employee contribution to risk, injury, or death is irrelevant to employer liability once a statutory hazard independent of the employee misconduct is established (i.e. the common law defenses of contributory negligence and assumption of risk are not appropriate defenses to a charge of general duty violation). Such defenses would be inappropriate to an injunctive proceeding in any event. Blumrosen, *supra* note 20, at 713.

2. Primary Jurisdiction and Exhaustion of Administrative Remedies

Under the comprehensive administrative scheme set up by the Act, employees are afforded several rights and protections.[83] One of the most significant is the ability of the employee to initiate inspections by filing a properly completed confidential complaint.[84] If the Secretary believes the complaint has merit, an inspection will be scheduled as soon as practicable, in accordance with established inspection priorities.[85]

The existence of a federal administrative apparatus for dealing with employee complaints may be an obstacle in the way of direct employee access to state courts for injunctive relief. Application of the doctrines of primary jurisdiction and exhaustion must be considered where an established administrative framework is present. The doctrine of primary jurisdiction addresses the question of whether a court or an administrative agency should make the initial decision on a given issue.[86] This doctrine is conceptually based on the need for an orderly and reasonable coordination of the work of agencies and courts.[87] "The trial court should exercise its discretion with an understanding that the legislature has created the agency in order to afford a systematic method of fact-finding and policy-making and that the agency's jurisdiction should be given

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[83] 1. EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 571 (1979).

[84] To meet the formality requirements of the Act, as outlined in section 8(f) of the Act, 29 U.S.C. § 657(f) (1976), and 29 C.F.R. § 1903.11 (1979), a complaint must:

a. Be reduced to writing (either on a Form OSHA-7 or in a letter);

b. Allege that a violation of the Act exists in the workplace;

c. Set forth with reasonable particularity the grounds upon which it is based. This does not mean that the complaint must specify a particular standard; it need only specify a condition or practice that is hazardous, and if uncommon, why it is hazardous; and

d. Be signed by one or more employees or their representatives.

U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; OSHA FIELD OPERATIONS MANUAL, ch. VI. ¶ 4340.3 (1979). Complaints may be filed orally, in person or by telephone; however, if a complaint does not meet the formality requirements specified in the regulations, it will not be given the priority of a formal complaint, nor will the complainant be given the additional rights afforded a complainant with a formal complaint. *Id.* ¶ 4340.5.

[85] M. ROTHSTEIN, OCCUPATION SAFETY AND HEALTH LAW, *supra* note 27, § 182.

In determining workplace inspection priorities, OSHA has established a "worst first" approach. Inspections are ranked in the following order of priority: (1) imminent danger; (2) catastrophe and fatality investigations; (3) employee complaints; (4) special emphasis program inspections; and (5) general (random) inspections. *Id.* at 214. *See* OSHA FIELD OPERATIONS MANUAL, ch. IV ¶ 4327.2 (1979).

[86] K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 19.01 (1958).

[87] G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379, 1383 (Alaska 1974).

priority in the absence of a valid reason for judicial intervention."[88] The purpose and operational concept underlying the doctrine of primary jurisdiction indicate that under most circumstances it would be applicable in the case of an employee seeking an injunction under his common law right to a safe work environment. Thus, it appears an employee would at least have to request an OSHA inspection.

The doctrine of exhaustion contemplates a situation where some administrative action is underway but is as yet uncompleted,[89] and generally holds that administrative remedies must be exhausted before judicial relief is sought.[90] This doctrine is applicable to actions for an injunction and may be the basis for a refusal by the court to entertain such an action.[91] However, impossibility or improbability of obtaining adequate relief through pursuit of administrative remedies is often a reason for dispensing with the exhaustion requirement.[92] In particular, excessive delay may lead to a determination that the administrative remedy is inadequate.[93] For the employee faced with a dangerous condition, OSHA's delay in conducting an inspection once a complaint is filed may provide a basis for circumventing the exhaustion requirement. For example, the General Accounting Office recently criticized OSHA for not responding quickly enough to complaints which involve potentially serious hazards.[94] Delays of as long as 108 days were reported.[95] In such situations an employee would be justified in claiming that his remedy at law was inadequate and thus any requirement of exhaustion should be waived.

The foregoing analysis relating to primary jurisdiction and exhaustion of administrative remedies would be applicable to any employee seeking to enjoin an occupational hazard in state court. In order to evaluate the availability of an injunction in light of pre-

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[88] Wisconsin Collectors Ass'n. v. Thorp Fin. Corp., 32 Wis.2d 36, 45, 145 N.W.2d 33, 37 (1966), *quoted in* State v. Dairyland Power Coop., 52 Wis.2d 45, 56, 187 N.W.2d 878, 883 (Wis. 1971).

[89] *Id.* at 54, 187 N.W.2d at 882.

[90] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 20 (1958).

[91] *See* Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

[92] K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.07 (3d ed. 1972).

[93] *Id. See* Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926).

[94] U.S. GENERAL ACCOUNTING OFFICE, HOW EFFECTIVE ARE OSHA'S COMPLAINT PROCEDURES (1979), *noted in* [1978-1979 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,665.

[95] *Id.*

vailing labor policy, the focus of the remainder of this article is narrowed to consideration of the employee in a union shop. In these sections the strong federal labor policy favoring collective action emerges as one of the foremost barriers to an injunctive remedy for the individual employee.

IV. The Union Shop: The Tension Between Collective Action and Individual Access to the Courts

For the employee in a union shop, a determination of whether he may obtain an injunction based on his common law right to a safe work environment requires more than a consideration of whether such an injunction is consistent with the Occupational Safety and Health Act and administrative law. The fact that he is a party to a collective bargaining contract which may expressly or implicitly provide for arbitration of health and safety issues presents an obstacle impeding direct employee access to the courts.

A. The Strong Policy Favoring Arbitration as a Mechanism for Dispute Resolution

The three cases comprising the *Steelworkers Trilogy*[96] manifest American labor policy's strong deference to arbitration. In those cases the Supreme Court outlined the appropriate function of the judiciary in resolving disputes arising under a collective bargaining agreement calling for a submission of grievances to arbitration. The Court determined that judicial inquiry must be confined to the question of whether the reluctant party agreed to arbitrate the grievance or agreed to give the arbitrator power to make the award he made.[97] In other words the judiciary may not undertake to determine the merits of a grievance;[98] rather, it is limited to interpreting the grievance procedure of a collective bargaining agreement. Moreover, the judiciary must broadly interpret any arbitration clause in a labor contract: "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not suscepti-

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[96] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[97] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[98] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

ble of an interpretation that covers the asserted dispute."[99] Thus a presumption of arbitrability exists where it is unclear whether or not the arbitration clause is applicable to the matter in dispute.

In *Gateway Coal Co. v. United Mine Workers of America*,[100] the Supreme Court extended the presumption of arbitrability set forth in the *Steelworkers Trilogy* to cover safety disputes.[101] In *Gateway Coal*, miners struck to protest an alleged safety hazard. The union refused a company offer to arbitrate the matter despite a broad arbitration clause in the collective bargaining contract which provided for arbitration of "any local trouble of any kind aris[ing] at the mine."[102] The Court of Appeals for the Third Circuit held the union had no contractual duty to submit the controversy to arbitration.[103] It reasoned that the usual federal policy favoring arbitration of labor disputes should not extend to disputes over hazardous conditions.[104] The Supreme Court reversed.[105] It rejected the view of the Third Circuit and held that the safety dispute in *Gateway* was covered by the arbitration clause in the parties' collective bargaining agreement.[106]

The Court's holdings in *Gateway* and the *Steelworkers Trilogy* reflect both its desire to maintain consistency with the congressional policy in favor of settlement of disputes through the machinery of arbitration[107] and its own appreciation of the value of arbitration in achieving industrial peace.[108] The Court recognized the unique role of grievance machinery in industrial self government:

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[99] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

[100] 414 U.S. 368 (1974).

[101] *Id.* at 379.

[102] *Id.* at 375.

[103] Gateway Coal Co. v. United Mineworkers of America, 466 F.2d 1157 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974).

[104] *Id.* at 1160.

[105] Gateway Coal Co. v. United Mineworkers of America, 414 U.S. 368 (1974).

[106] *Id.* at 379-80.

[107] *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

Section 203(d) of the Labor Management Relations Act states in relevant part: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . . " 29 U.S.C. § 173(d) (1976).

[108] *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

> Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
>
> . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.[109]

Preference for the use of internal grievance procedures that precede the arbitral requirement was expressed in *Republic Steel Corp. v. Maddox*.[110] In that case Maddox brought suit against Republic Steel, his former employer, for severance pay[111] allegedly owed him under the terms of the collective bargaining agreement existing between his union and Republic. The agreement contained a three-step grievance procedure to be followed by binding arbitration, but Maddox made no effort to utilize this procedure. Instead he sued for breach of contract.[112] In a major decision, the Supreme Court reversed a lower court holding in favor of Maddox.[113] It held that as a general rule, in cases to which federal law applies, an employee wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.[114] The Court noted that "a contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances."[115]

The above cases taken together represent strong support for the position that when health and safety matters are not excluded[116]

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[109] *Id.* at 581.

[110] 379 U.S. 650 (1965).

[111] Severance pay is simply a payment made by an employer to an employee upon termination of employment. BALLENTINE'S LAW DICTIONARY 1170 (3d ed. 1969).

[112] Republic Steel Corp. v. Maddox, 379 U.S. 650, 651 (1965).

[113] *Id.* at 659, *reversing* 275 Ala. 685, 158 So.2d 492 (1963).

[114] *Id.* at 652.

[115] *Id.* at 653. The rule set forth in *Republic Steel* has retained its vitality in subsequent cases. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); Coe v. United Rubber, Cork, Linoleum and Plastic Workers of America, 571 F.2d 1349 (5th Cir. 1978).

[116] One possible outcome of the decision in *Gateway* which extended the "presumption of arbitrability" to safety disputes is that unions will seek contract language specifically exempting safety disputes from the arbitration procedure. The United Auto Workers Union

from the collective bargaining agreement, a union employee must exhaust available grievance procedures before looking to the courts.

B. *The Case for a Private Right of Action: Limitations of the Grievance Machinery from an Employee's Perspective*

In *Vaca v. Sipes*[117] a union member sued his union alleging he had been discharged from his employment in violation of the collective bargaining contract between his employer and the union, and that the union had arbitrarily refused to take his grievance to arbitration. In reaching its decision in favor of the union, the Supreme Court reaffirmed its holding in *Republic Steel Corp. v. Maddox*[118] that an employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the collective bargaining agreement.[119] However, the Court recognized that "because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant."[120] After noting that one situation where this might occur is where the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance, the Court held that an employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.[121] However, the *Vaca* guarantee to the employee that the union will exert a good faith effort in handling his grievance may not be sufficient in a safety context.

Even good faith adherence by the union to its duty of fair representation may not be consistent with the interests of the individual worker.[122] In *Vaca* the Court held that a union does not breach its

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has already done so. ASHFORD, *supra* note 7, at 198.

[117] 386 U.S. 171 (1967).

[118] 379 U.S. 650 (1965).

[119] Vaca v. Sipes, 386 U.S. 171, 184 (1967).

[120] *Id.* at 185.

[121] *Id.*

[122] It should be noted that by introducing safety provisions into its collective bargaining agreement with an employer, a union does not thereby assume a duty to provide employees with a safe place to work and is not chargeable with the duty to make safety inspections. The courts which have considered this question have reasoned that to hold the union liable

duty of fair representation merely because it settles a grievance short of arbitration.[123] Yet, there may be reasons unrelated to the merits of a grievance why a union would not pursue the grievance and yet not be in breach of its duty of fair representation. For instance, the best interest of the collective membership might not justify the expense of pursuing the grievance.[124] In fact, the Court in *Vaca* held that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious.[125]

Equally ominous for the individual grievant is the situation in which the union does not adhere to its duty of fair representation. Orchestration of arbitration awards and perfunctory prosecution of grievances by unions may make a sham of the grievance procedure for the individual employee.[126] Orchestration of an arbitration award results when the union agrees with the company either explicitly or tacitly that a result contrary to the grievant's interest should flow from the arbitration.[127] This is then communicated either explicitly or implicitly by the union's actions and arguments to the arbitrator, who tailors his award accordingly.[128] "[T]he arbitrator's acquiescence in a rigged award may result from the fundamental fact that he is dependent for his livelihood on his acceptability to the parties who hire him."[129] A union may orchestrate an award for several reasons: (1) it may be antagonistic to a grievant who has criticized or opposed union officials; (2) it may wish to obtain the arbitrator's inprimatur on a particular contractual interpretation prior to formal renegotiation; or, (3) it may have made an agreement with the employer not to press the employee's griev-

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for an employee's injury simply because the union agreed to safety provisions in its collective bargaining agreement would be contrary to national labor policy and would discourage the inclusion of similar or more effective standards in later contracts. Bryant v. International Union, United Mine Workers of America, 467 F.2d 1 (6th Cir. 1972); Higley v. Diston, Inc., [1975-76] OSHD (CCH) ¶ 20,689.

[123] Vaca v. Sipes, 386 U.S. 171, 192 (1967).

[124] *See* Comment, *Employee Challenge to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310, 1331 (1977). *See also* Kilberg & Bloch, *Making Realistic the Arbitration Alternative*, 50 J. URB. L. 21, 43 (1972).

[125] Vaca v. Sipes, 386 U.S. 171, 195 (1967).

[126] Comment, *Employee Challenge to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310, 1333 (1977).

[127] *Id.* at 1332.

[128] *Id.*

[129] *Id.* at 1334.

ance in exchange for concessions by the employer on other issues.[130] In such situations it would be difficult for the employee to prove union bad faith. Even the Supreme Court has conceded this,[131] lending validity to the comment that "in practice, individual worker rights against unfair union representation are more rhetorical than real."[132]

When these limitations of the grievance-arbitration machinery are considered in the context of a health or safety grievance the reason for placing safety in a category different from that of wages, fringe benefits, or other working conditions becomes apparent. The importance of workplace safety to the individual and the community compels consideration of the merits of the *underlying grievance* before we concern ourselves with the maintenance of an efficient machinery for resolution of disputes. The Appeals Court decision in *Gateway* recognized this:

> A dispute concerning the safety of the place and circumstances in which employees are required to work is *sui generis* . . . If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment.[133]

Access to state courts by way of a proceeding in equity without a requirement of exhausting available internal remedies is one way an employee can seek a more satisfactory resolution of his grievance. That is not to say that internal remedies should not be utilized. Rather, it is to say that the choice should be that of the grievant's at every stage of the procedure. Existing law with regard to contractual claims is not an appropriate analogy.[134]

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[130] *Id.* at 1332.

[131] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974).

[132] Marchione, *A Case for Individual Rights Under Collective Agreements*, 27 LAB. L.J. 738, 744 (1976).

[133] Gateway Coal Co. v. United Mineworkers of America, 466 F.2d 1157, 1159-60 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974).

[134] An employee seeking an injunction would not be suing for breach of contract. However, his grievance would be arising out of the same fact situation as that frequently covered by a collective bargaining agreement. The strong policy favoring resolution of grievances through the use of internal grievance machinery is therefore relevant.

V. Precedent for Individual Access to the Courts

In cases in which individuals have asserted federal statutory rights under the Civil Rights Act of 1964 and the Fair Labor Standards Act, courts have attempted to accommodate federal labor policy and the important policy interests manifested by the federal statutes involved. Those cases stand as precedent for the individual who seeks to enforce his common law right to a safe workplace. Although in the former cases statutory rights were being pursued and in the latter instance a common law right is involved, the same key element is present in both situations: the advancement of a policy interest strong enough to justify an accommodation of federal labor policy.

A. Alexander v. Gardner-Denver Co.

Alexander v. Gardner-Denver Co.[135] involved "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII of the Civil Rights Act of 1964. . . ." [136] Following discharge by his employer, Harrell Alexander, a black male, filed a grievance under the collective-bargaining agreement between his employer and his union.[137] The agreement contained a broad arbitration clause;[138] disputes were to be submitted to a multi-step grievance procedure and if the dispute remained unresolved, it was to be remitted to compulsory binding arbitration.[139] The union processed Alexander's grievance and in the final prearbitration step Alexander raised the claim that his discharge resulted from racial discrimination. The company rejected all of Alexander's claims and the grievance proceeded to arbitration. However, prior to the arbitration hearing Alexander filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the case to the Equal Employment Opportunity Commission (EEOC). The arbitrator ruled that Alexander's discharge was for cause.[140] Following the EEOC's subsequent de-

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[135] 415 U.S. 36 (1974).
[136] *Id.* at 38. Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976).
[137] Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 (1974).
[138] *Id.* at 40.
[139] *Id.* at 41.
[140] *Id.* at 42.

termination that there was not reasonable ground to believe that a violation of Title VII had occurred, Alexander filed an action in federal district court alleging that his discharge resulted from a racially discriminatory employment practice in violation of the Civil Rights Act.[141]

The District Court granted Gardner-Denver's motion for summary judgment, holding that Alexander was bound by the arbitral decision and thereby precluded from suing his employer under Title VII.[142] The Court of Appeals affirmed.[143] The U.S. Supreme Court reversed.[144] The Court held that an employee's statutory right to a trial de novo under Title VII of the Civil Rights Act of 1964[145] is not foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective bargaining agreement. It concluded that:

> the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.[146]

In reaching its decision, the Court focused on the statutory scheme and purpose peculiar to Title VII.[147] However, much of the Court's reasoning is readily applicable to the case of an employee seeking an injunction to enforce his common law right to a safe workplace. In concluding that a cause of action was not precluded by prior arbitration, the Court relied on what it inferred was congressional intent that Title VII was to "supplement rather than supplant, existing laws and institutions relating to employment discrimination."[148] Certainly, in enacting the Occupational Safety and Health Act, Congress evinced a similar intent to afford overlapping remedies for enforcement of occupational safety.[149]

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[141] *Id.* at 43.

[142] Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971).

[143] Alexander v. Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972).

[144] Alexander v. Gardner-Denver Co., 415 U.S. 36, 43 (1974).

[145] 42 U.S.C. § 2000e-5(f)(1) (1976) allows for a private right of action as a means of obtaining judicial enforcement of Title VII.

[146] Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).

[147] *Id.* at 44-49.

[148] *Id.* at 48-49.

[149] The language of the Act makes clear that it was not intended to supersede or in any other manner affect an employee's common law rights with regard to occupational safety. *See* text at note 80 *supra*.

In addition, in *Alexander*, the Court emphasized the independence of contractual and statutory rights:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.[150]

Thus the Court made clear that a collective bargaining agreement which provides for arbitration does not necessarily prevent consideration in a different forum of separate claims arising from the same facts.[151] There is a similar distinction between contractual and common law rights with regard to occupational safety, and an inconsistency does not necessarily result from permitting both rights to be enforced to their respective forums.

B. The Extension of Alexander

In *Leone v. Mobil Oil Corp.*,[152] employees brought suit against their employer for an alleged violation of the Fair Labor Standards Act (FLSA)[153] without first attempting to use the grievance procedure specified in their collective bargaining agreement. The FLSA mandates payment of certain overtime compensation to covered employees[154] and creates a cause of action in favor of aggrieved employees to recover from their employer any unpaid overtime and an additional equal amount as liquidated damages.[155] The Court of Appeals for the District of Columbia held that an employee may bring suit for an alleged violation of the FLSA without first attempting to vindicate that right through the grievance procedure specified in the bargaining agreement.[156] The court took the position that the rationale of *Alexander v. Gardner-Denver* supported this limitation on the exhaustion doctrine in the context of FLSA wage claim suits. It reasoned that the pervasive statutory scheme

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[150] 415 U.S. 36, 49-50 (1974).
[151] *See* Blumrosen, *supra* note 20, at 729.
[152] 523 F.2d 1153 (D.C. Cir. 1975).
[153] 29 U.S.C. §§ 201 to 219 (1976).
[154] 29 U.S.C. § 207 (1976).
[155] 29 U.S.C. § 216 (1976).
[156] Leone v. Mobil Oil Corp., 523 F.2d 1153, 1159 (D.C. Cir. 1975).

of the FLSA, like that of Title VII, evidenced congressional intent that rights based on the FLSA be judicially enforced.[157] Moreover it concluded that because the arbitrator's authority is limited by the terms of the collective bargaining agreement the arbitrator cannot be the final arbiter of rights created by statute.[158] The holding in *Leone v. Mobil Oil Corp.* echoed dictum in an earlier D.C. Circuit court opinion where the court indicated that its interpretation of the relationship between arbitration and the Mine Safety Act[159] is similar to the Supreme Court's analysis in *Alexander v. Gardner-Denver Co.*[160]

However, not all jurisdictions have been as willing to extend the rationale of *Alexander.* In *Satterwhite v. United Parcel Service, Inc.*,[161] the Court of Appeals for the Tenth Circuit held that employees' rights to sue under the Fair Labor Standards Act for overtime compensation were foreclosed by their prior submission of the same claim to final arbitration under the grievance procedure of their collective bargaining agreement. Similarly, in *Marshall v. Coach House Restaurant, Inc.*,[162] the District Court for the Southern District of New York adopted the analysis of the court in *Satterwhite* and held that when an employee submits a wage claim to binding arbitration he may not thereafter litigate the claim in a FLSA action. These courts concluded that the analysis in *Alexander* was not applicable to FLSA suits. In essence they reasoned that in a wage claim context, the national policy favoring arbitration assumes greater significance then when Title VII rights are at issue. The courts engaged in a balancing test and concluded that since FLSA wage rights do not enjoy the same "high priority" as do Title VII rights, interference with the policy favoring arbitration is not justified.[163]

With reference to the relationship between the holding in *Alexander* and FLSA wage claim suits, the decisions in *Satterwhite*

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[157] *Id.* at 1158.

[158] *Id.* at 1158-59.

[159] Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C. §§ 801 to 960 (1976).

[160] *See* Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 776 n.15 (D.C. Cir. 1974).

[161] 496 F.2d 448 (10th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974); *cf.* Union de Tronquistas de Puerto Rico, Local 901 v. Flagship Hotel Corp., 554 F.2d 8 (1st Cir. 1977) (arbitrator's interpretation of an administrative regulation as it related to employees covered by a collective bargaining agreement held final and binding).

[162] 457 F.Supp. 946 (S.D.N.Y. 1978).

[163] *Id.* at 950-51.

and *Coach House* represent a position contrary to that taken by the D.C. Circuit. However, if viewed on another level the differences in the cases represent only differences in degree. All of the cases support the proposition that the principles set forth in *Alexander* need not be understood as applicable only to cases involving racial discrimination under Title VII. The D.C. Circuit goes so far as to extend *Alexander* to wage claim disputes.[164] Using a stricter balancing test, other courts would not go as far. However, these courts do recognize that there are contexts in which individual rights may outweigh national policy favoring internal resolution of disputes. Occupational safety should be one of them. The recognized importance of workplace safety puts it, like discrimination, in a category justifying an accommodation between individual rights and federal labor policy.

Critics of the idea of broadening individual rights under collective agreements argue that such an extension would weaken the collective bargaining process by undermining the employer's incentive to arbitrate.[165] It has been argued that if a grievance procedure cannot be made exclusive, it loses its desirability as a method of settlement.[166] However, there is still ample incentive for collective bargaining without exclusive grievance procedures, and individual access to the courts is not necessarily inconsistent with use of the grievance-arbitration machinery. The Supreme Court has stated that "[t]he primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. . . . 'a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration.' "[167] Just as the Court reasoned in *Alexander*[168] with regard to judicial remedy under Title VII, it may be reasoned that most employers will regard the benefits derived from a no-strike obligation as outweighing whatever costs may result from according employees an arbitral remedy against safety and health hazards in addition to their remedy under common law.[169]

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[164] Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975).

[165] *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965); Marchione, *A Case for Individual Rights Under Collective Agreements*, 27 LAB. L.J. 738, 739 (1976).

[166] *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

[167] Alexander v. Gardner-Denver Co., 415 U.S. 36, 54-55 (1974) (quoting Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 248 (1970)).

[168] Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974).

[169] *Id.*

Finally, "the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes. . . . "[170] Where the collective-bargaining agreement contains adequate provisions relating to workplace health and safety and "where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee."[171] Thus provision for arbitration may in many cases preclude the need for resort to the judicial forum.

VI. Conclusion

The enactment of the Occupational Safety and Health Act in 1970 evidenced legislative recognition of the importance of assuring safety in workplace environments. However, developments under the Act have proven insufficient to effectively cope with the problems which led to its enactment. Moreover, it may be difficult for an employee to utilize other statutory self-help options without risking job loss. As an alternative mode of redress, an employee faced with a continuing occupational hazard should be permitted to seek injunctive relief from a state court if he can establish the right to such relief under equitable principles of state law.

Such a proceeding has not been pre-empted by congressional adoption of the Occupational Safety and Health Act. Moreover, it should not be considered inconsistent with American labor policy. To insure healthful workplace conditions the merit of a safety grievance must take precedence over maintenance of an efficient machinery for resolution of labor disputes. As is the case where other important interests are at stake, where safety is at issue, labor policy must accommodate individual rights.

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[170] *Id.*
[171] *Id.*